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IN THE

Supreme Court of the United States

.....Term, 1975

No. 75-101

ORLANDO JAMES VIGI, DAVID PALMER, NICK FLOWERY, ROBERT GERALD PAPPAS, STEVEN KISHNER and BETTY ERDMAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 30, 1975.

Citations to Opinions Below

The District Court's Opinion denying motions to suppress evidence is reported at 350 F. Supp. 1008 and is reprinted in Appendix A. The Opinion refusing Defendants' motions for a new trial is reported at 363 F. Supp. 314 and is reprinted in Appendix A.

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Jurisdiction

The judgment of the Court of Appeals was entered April 30, 1975. A timely petition for rehearing was filed and was denied June 18, 1975. (Appendix C, *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

1. Whether an order authorizing a wire interception is facially insufficient in violation of 2518 10(a)(ii) where it recites that authority to make the application has been given by the Acting Assistant Attorney General.

Statutes Involved

The statutory provisions involved are set forth in Appendix D, *infra.*

Statement of the Case

The Petitioners in this case were charged with violations of 18 U.S.C. 371 and 18 U.S.C. 1955. Petitioners Vigi, Flowery, Palmer, Pappas and Kishner were found guilty of both counts. Petitioner Erdman was acquitted on count one and convicted on count two following a jury trial in the United States District Court for the Eastern District of Michigan, Southern Division. Petitioners were sentenced as follows:

> ORLANDO VIGI—Two years, 18 months suspended and a fine of $5,000.00.
>
> DAVID PALMER—One year on each count, execution suspended as to all but the first 60 days to run concurrent, three years probation and a $1,000.00 fine.
>
> NICK FLOWERY—One year on each count, execution suspended as to all but the first 60 days to run concurrent, three years probation and a $1,000.00 fine.

ROBERT PAPPAS—Three years probation and a $2,000.00 fine.

STEVEN KISHNER—Three years probation.

BETTY ERDMAN—Three years probation and a $1,000.00 fine.

On November 24, 1971, December 15, 1971, and December 27, 1971, the Federal Bureau of Investigation conducted court-authorized wiretaps on various telephones pursuant to an investigation into possible violations of 18 U.S.C. § 1955. The first wire interception was for a period of twenty (20) days and was extended ten (10) days by the second order. The third interception was also for a period of (20) days.

The interceptions were authorized by the District Court upon submission of an application and affidavit by David J. Cook, Special Attorney, United States Department of Justice.

Each of the applications purportedly was authorized by Henry Petersen, Acting Assistant Attorney of the Criminal Division. Each of the court orders recited that authority for the application was given by the Acting Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Henry E. Petersen.

The evidence gained by the wire interceptions so authorized was introduced at trial and tended to show petitioners were engaged in a sports betting operation.

Reasons for Granting the Writ

The question presented here has been presented to the Third Circuit Court of Appeals in *United States* v. *Acon*, 513 F2d. 513, the Fifth Circuit Court of Appeals in *United States* v. *Robertson*, 504 F2d. 289, and to the First Circuit Court of Appeals in *United States* v. *Pellici*, 504 F2d. 1106. Included within the question as stated is the question of the authority of

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an Acting Assistant Attorney general to authorize applications for wire interceptions.

Each of the aforementioned Courts has answered the questions differently and in *Acon* and *Pellici* in direct conflict with one another.

In *Pellici*, the first of the cases decided, a wiretap application had been approved by Robert H. Bork, Acting Attorney General.

Holding that such approval did not violate 18 U.S.C. 2516, (suppression for facial insufficiency under 2518 10(a)(ii) was not raised in the Opinion), the Court of Appeals in a per curiam opinion said that an Acting Attorney General has all the powers of one confirmed by the Senate.

One month later, the Fifth Circuit held in *Robertson* that suppression was not required where the Application and Order recited that approval for a wire interception was given by the Acting Assistant Attorney General but had actually been given by the Attorney General. The Court considered only the issue of misidentification as a suppression ground under 10(a)(i) and found this Court's decision in *United States* v. *Chavez*, 416 U.S. 562, controlling on that question. Again, as in *Pellici*, suppression for facial insufficiency under 10(a)(ii) was not raised in the Opinion.

In *United States* v. *Acon*, the Third Circuit disagreed with the holdings in both *Robertson* and *Pellici*. They said *Robertson* did not control because it did not address itself to the question of whether suppression was required for facial insufficiency under 10(a)(ii).

They disagreed with the First Circuit's decision in *Pellici* that an "acting" officer has the authority to approve wire interception applications and said that:

> "Although for other purposes this may be true, we cannot agree in this context. Congress has created a very narrow

> and specific authorization power. An acting assistant attorney general is not mentioned in the statute. Neither does an acting assistant attorney general meet the Supreme Court's test of political responsiveness. As such, an acting assistant attorney general who has not been appointed by the President and confirmed by the Senate may not be designated specially to authorize wiretaps under 2516(1)." *United States* v. *Acon*, *supra*. at 516.

The Court noted but declined to follow the contrary holding of the First Circuit in *Pellici*. Id. at F.N. 10.

Although finding that the Order did violate 10(a)(ii), the Court reversed the lower court's Order of Suppression because:

> "We perceive a distinction between information which the government may vary by subsequent affidavit and information which must stand on the four corners of the affidavit. Based on this difference, we conclude that suppression is not required for facial insufficiency relating to less critical requirements which may be varied by subsequent affidavits." *United States* v. *Acon* at Page 518.

In the instant case, the Court disagreed with the Court in *Acon* and said that the issue was governed by 10(a)(i) and so controlled by this Court's decision in *United States* v. *Chavez*, *supra*. The Court thus declined to reach the question of the authority of an Acting Assistant Attorney General to approve wiretap applications.

Insofar as the Third Circuit in *Acon* has said that the question presented here is clearly distinguishable from that considered in *Chavez* because it is not an attack on misidentification under 10(a)(i) but the facial sufficiency under 10(a)(ii), that Circuit is now in direct conflict with the Fifth and Sixth Circuit on the controlling law on this question.

The holdings of the Court of Appeals here and in *Robertson*, that because the defect is not unlawful under 10 (a)(i),

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suppression under 10(a)(ii) need not be considered, ignores Congressional intent in enacting 10(a)(ii) and this Court's decision in *United States* v. *Giordano*, 416 U.S. 505 at 527, where it was held that:

> "Paragraph (ii) and (iii) must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)."

To find as the Court did in *Acon*, that technical violations of 10(a)(ii) may be overlooked, drains that section of all meaning and likewise disregards the plain language of *Giordano* where the Court said:

> "On the other hand, (ii) and (iii) plainly reach some purely statutory defaults without constitutional overtones, and these omissions cannot be deemed unlawful interceptions under paragraph (i) else there would have been no necessity for paragraph (ii) and (iii)."

The result of the various circuit opinions on this questions is that the law is in a state of irreconcilable conflict, with the First Circuit holding that an acting officer has all the powers of one confirmed by the Senate; the Fifth and Sixth avoiding that question altogether and holding that 2518 10(a)(i) and *United States* v. *Chavez, supra*, govern the issue; and the Third Circuit disagreeing with all of the other circuits, saying that an acting officer cannot authorize wiretap applications and that *United States* v. *Chavez* does not control because the question concerns 10(a)(ii) and 10(a)(i).

The question presented is important because of the conflict which presently exists in the lower courts. We, therefore, respectfully urge this Court to resolve this conflict and to ultimately decide that an order authorizing a wire interception which recites that authority to make the application has been given by the Acting Assistant Attorney General is facially insufficient in violation of 2518 10(a)(ii) and the evidence so obtained should be suppressed.

Conclusion

It is respectfully submitted that certiorari should be granted as to the question raised in this petition because of the conflict in the Courts and the frequency of the problem. A final determination of the question is of great practical importance.

Respectfully submitted,

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APPENDIX A

Opinions of the District Court Below

UNITED STATES DISTRICT COURT
Eastern District of Michigan
South Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORLANDO VIGI, et al.,

Defendants.

Criminal Action No. 46922

MEMORANDUM OPINION AND ORDER

The defendants have asked the court to suppress all wiretap evidence because such evidence was not obtained in conformity with 18 U.S.C. 2516 and 2518.

Specifically, the motions filed by the various defendants raise the following issues:

1. The constitutionality of Title 18, Section 2510-2518.

2. The validity of an authorization for an application to intercept wire communications required by 18 U.S.C. 2516, signed by Henry E. Petersen, who was at that time only the Acting Assistant Attorney General.

3. The sufficiency of the identification of the authorizing officers as required by Sections 2518(1) and (4), Title 18 U.S.C.

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CONSTITUTIONALITY

The defendants assert that Title 18, Sections 2510 through 2518 are unconstitutional. They base this assertion on an opinion by Judge Joseph S. Lord, III, in the case of *United States vs. Whittaker*, 3rd Cir., 70-324. In that case, Judge Lord on May 31 of this year held these provisions were unconstitutional on their face in that "the protections afforded the citizen (by the statute) against unreasonable government intrusions, are largely illusory" and thereby contravene the Fourth Amendment. The statute in question was drafted to conform with *Berger vs. New York*, 338 U.S. 41 (1967); and *U.S. vs. Katz*, 389 U.S. 347 (1967). All other courts with the exception noted above have held the statute constitutional. *United States vs. Cox*, 449 F.2d 679 (10th Cir. 1971); *United States vs. Leta*, 332 F.Supp. 1357 (W.D. Pa. 1971); *United States vs. Scott*, 331 F.Supp. 233 (D.C.D.C. 1971); *United States vs. Canton*, 328 F.Supp. 561 (E.D. Pa. 1971); *United States vs. Sklaroff*, 323 F.Supp. 296 (S.D. Fla. 1971); *United States vs. Escandar*, 319 F.Supp. 295 (S.D. Fla. 1970); *United States vs. Donlon*, 331 F.Supp. 979 (D.C. Dela. 1971); *United States vs. Lawson*, 334 F.Supp. 612 (E.D. Pa. 1971); *United States vs. Cox, et al.*, 462 F.2d 1293 (8th Cir. 1972). These courts examined the statute in detail and pointed out that all of the tests of *Berger* and *Katz* had been met or exceeded. The statute contains ample protection and safeguards to alleviate the potential threat to individual privacy. It provides close judicial supervision, limited duration, particularity and subsequent notice. In the court's opinion, Judge Lord in *United States vs. Whittaker* was wrong, and the statute is constitutional.

AUTHORIZATION

The statute is clear. Section 2516(1) provides that "The Attorney General, or any Assistant Attorney General specifially designated by the Attorney General, may authorize an application to a Federal judge . . ." In this case, Henry Petersen was only the Acting Assistant Attorney General. Until an Assistant Attorney General was appointed and confirmed he held that position. In fact, subsequently he was confirmed by the Senate. He was not an assistant to the Attorney General or a deputy Assistant Attorney General, but held the position of Assistant Attorney General, although he had not as yet been confirmed by the Senate. He was a bona fide Acting Assistant Attorney General and as such had all the powers and obligations of that position.

Affidavits of Petersen and John Mitchell have been filed. They establish that Petersen was specially designated by Mitchell to authorize applications. They establish that Mr. Petersen recommended the authorization be granted. They also establish that the Attorney General himself reviewed these applications and personally approved the request. In either case it is clear that Section 2516 has been complied with. *United States v. Pisacano*, 459 F.2d 259 (2nd Cir. 1972); *United States vs. Ceraso*, 11 Cr.L. 2513 (3rd Cir. 1972); *United States vs. Cox*, 462 F.2d 1293 (8th Cir. 1972); *United States vs. Aquino*, 338 F.Supp. 1080 (E.D. Mich. 1972).

IDENTIFICATION

Section 2518(1) and (4), Title 18 U.S.C.A., require that the authorizing official be identified in both the application and the order for the wiretap. In the instant case both John Mitchell and Henry Petersen authorized the application. The authorizing official in the communication to the judge was iden-

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tified as Henry Petersen. Defendant urged that this is error sufficient to warrant suppression of the evidence in question.

In *United States vs. Consiglio*, 342 F.Supp. 556 (D.C. Conn. 1972), the Court found that since the defendant did not show any injury due to being misled by the identification the evidence would not be suppressed. Similarly, the Court in *United States vs. Becker*, 461, F.2d 230 (2d Cir. 1972), citing *Consiglio, supra*, stated that such a failure to correctly identify the authorizing officer was harmless error so long as the authorization itself was proper.

In this case it is clear that the Attorney General, as well as the specially designated Assistant Attorney General and the Attorney General. A proper person was identified in the authorization to seek the application as well as in the order itself. *United States vs. Ceraso, supra.*

The instant case differs from *United States vs. Wierzbicki*, (E.D. Mich. 1972) Criminal Action Number 45884, in that the Court therein found that the authorizations in that case were not given by persons specified in the statute, whereas in the present case the authorizations were proper. Both the authorization and the identification of the authorizing officers comply fully with the intent of Congress expressed in Senate Report No. 1097 to fix responsibility for wiretaps. The Court finds that for reasons given above the defendants' motion to suppress evidence is denied.

So ordered.

CHARLES W. JOINER,
United States District Judge.

Dated: November 3, 1972, Detroit, Michigan.

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UNITED STATES DISTRICT COURT
Eastern District of Michigan
Southern Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORLANDO VIGI, DAVID PALMER, STEVEN KISHNER, NICK FRANK FLOWERY, ROBERT GERALD PAPPAS and BETTY ERDMANN,

Defendants.

Criminal Action No. 46922

MEMORANDUM OPINION AND ORDER

Defendants Vigi, Pappas, Palmer, Kishner and Flowery were found guilty upon an indictment charging them with conducting an illegal gambling business and conspiracy to conduct an illegal gambling activity under 18 U.S.C. §§371 and 1955.[1] Defendant Erdmann was also indicted under 18 U.S.C. §§371 and 1955, but only convicted on one (1) count under 18 U.S.C. §371.

Judgment was entered on the verdict and all named defendants have filed motions for a new trial with this Court.

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[1] 18 U.S.C. §371 states in pertinent part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

(Footnote continued on following page)

An informant had supplied information to the government that defendant Vigi was operating an illegal gambling operation, and was using a commercial restaurant, at 21576 Grand River, Detroit, Michigan, as a clearing house to receive all types of sports and horse betting from various branch bookmakers. Andrew Alberts was described as Vigi's telephone operator at this location.[2] Court authorized wiretap surveillance of the telephones used by Vigi disclosed the in-

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(Footnote continued from preceding page)

18 U.S.C. § 1955 states in pertinent part:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) 'gambling' includes but is not limited to poolselling, bookmaking, . . .

(3) 'State' means any State of the United States, . . .

"(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

"(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States . . ."

The Michigan statutes relevant to this case are M.C.L.A. 750.301, 750.304, 750.305, 750.314, 750.315, 750.157(a), 750.167, 750.92 and 767.39.

[2] Mr. Alberts suffered a heart attack prior to trial, therefore his case was severed from the trial of the other named defendants.

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volvement of defendants Palmer, Pappas, Kishner, Flowery and Erdmann as branch bookmakers.

At trial, the government introduced into evidence gambling records which were seized from several of the defendants and extensive Court authorized wire intercepted conversations of all defendants conducting gambling business.

Defendants have alleged several grounds on which they contend the Court erred before and during the conduct of the trial.

Defendant Erdmann alleges the Court erroneously admitted into evidence a portion of the wiretap logs which were read into the record at trial. Specifically, defendant Erdmann assigns error to the admission of the following colloquy:

> "Alberts: Yes, well like I said I think she's (reference to defendant Erdmann) still booking, you know, look . . .
>
> Vigi: Well she is
>
> Alberts: For herself
>
> Vigi: Definitely booking
>
> Alberts: You know
>
> Vigi: You know why, you know why, uh, I think where this all come about. I think it was a couple days ago when Bob (reference to defendant Robert Pappas) was pickin [sic] up from this other joint, I had to meet him on something and uh, you know he was telling me where this guy's getting a line from Betty.
>
> Alberts: Uh huh
>
> Vigi: Yea, you understand what I'm saying?
>
> Alberts: Yes.
>
> Vigi: And I turned around and said to him uh, what guy? Some guy in some bar out on the east side and I say uh, you mean to tell me she's giving him a line?
>
> Alberts: Yea
>
> Vigi: He says yea, that's what I hear, I say are you kiddin [sic] me . . . Bob thought she was still coming in with us."

Defense counsel made timely objections to the admission of this conversation at trial. Defendant Erdmann now contends the conversation was multiple hearsay which involved an unknown man telling Bog something, which he relayed to Vigi, and which Vigi told Alberts.

It is a settled principle of evidence that statements made by a conspirator against the interest of a co-conspirator, in pursuance of the conspiracy, are extrajudicial admissions not subject to the hearsay rule. 4 Wigmore, *Evidence* § 1079 (Chadbourn rev. 1970); Rule 801(d)(2)(E), *Proposed Federal Rules of Evidence.*[3]

In the present case, the conversation between the co-conspirators Vigi and Alberts established that defendant Erdmann was already a member of the conspiracy. The statements made to Robert "Bob" Pappas by an unknown man merely dealt with the possibility that Erdmann was leaving the conspiracy to set up an independent bookmaking operation. The statements did not have any bearing on establishing Erdmann's role in the conspiracy. The statements of Vigi and Alberts had already established that fact. It was not error, therefore, to admit that portion of Call No. 10 (EDM No. 102, on December 10, 1971, at 7:11 p.m.) in which Vigi and Alberts discussed defendant Erdmann's activities pertinent to the conspiracy. Moreover, defendant Erdmann was only convicted for conspiracy to conduct an illegal gambling activity under 18 U.S.C. § 371, and not for the substantive act of conducting an illegal gambling activity under 18 U.S.C. § 1955.

[3] Although the Proposed Rules are not presently binding, they have been approved by the Supreme Court and should therefore be given special consideration. *See.* P.L. 93 12, 93d Cong., S. 583, 87 Stat. 9 (March 30, 1973) (delaying until further Congressional action the effective date of the Proposed Rules). *Desheles v. T.W. & C.B. Sheridan Co.*, Civil No. 72-1957 (6th Cir., filed Aug. 2, 1973).

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Defendants contend the verdict in this case was not based on substantial evidence.

The test to determine whether the jury's verdict is supported by substantial evidence is whether reasonable men, considering the evidence in the light most favorable to the government, could have found the defendants guilty beyond a reasonable doubt. *Glasser v. United States*, 315 U.S. 60, 80 (1942), *rehearing denied*, 315 U.S. 827; *United States v. Conti*, 339 F.2d 10, 13 (6th Cir. 1964).

The evidence against the defendants, as to both counts of the indictment, consisted of approximately ninety (90) telephone calls, sixty (60) exhibits including gambling records seized from the operations "phone man", and testimony of associated bookmakers, bettors, and a qualified expert in gambling terminology and gambling operations. The telephone calls themselves included conversations in which each of the convicted defendants were participants discussing their operations and actually engaging in the conduct of the operation.

The testimony of Special Agents Whitcomb and Esposito of the Federal Bureau of Investigation aided the jury in understanding what was transpiring in each conversation (*i.e.*, calling in groupings of wagers, giving line information, etc.) and the particular part in the scheme and operation played by each defendant.

The evidence presented to the jury showed each defendant had conspired with Vigi and Alberts to engage in some function of their operation. Vigi, Palmer, Kishner, Pappas and Flowery each went on to conduct all or part of some phase of the business, whether as a line source, collector, or bookmaker, within the time periods specified in the indictment. Finally, with the interpretive aid of the experts, this operation

was shown to have been substantially continuous in accepting wagers on sports and horse events for at least six months, and on various days during January and February of 1972, the operation had daily, gross revenues of between $10,000 and $16,000. Such evidence established defendant's guilt beyond a reasonable doubt.

Defendants allege the court also erred in permitting the jury to take the transcripts to the jury room during their deliberation.

It is well established that it is not an abuse of discretion to allow the jury to retain transcripts during the trial and their deliberations. *United States v. Koska*, 443 F.2d 1167, 1169 (2nd Cir. 1971), *cert. denied*, 404 U.S. 852; *United States v. Carson*, 464 F.2d 424 (2nd Cir. 1972); *United States v. Lawson*, 347 F.Supp. 144 (E.D. Pa. 1972).

Prior to trial defendants sought to suppress wiretap evidence obtained by the government because of lack of compliance with the authorization requirements of 18 U.S.C. §§ 2516 and 2518 (1)(a) and (4)(d). This Court, in *United States v. Vigi*, 350 F.Supp. 1008 (E.D. Mich. 1972), denied defendants' motion stating:

> "The statute is clear. Section 2516 (1) provides that 'The Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a Federal judge. . .' In this case, Henry Petersen was only the Acting Assistant Attorney General. Until an Assistant Attorney General was appointed and confirmed he held that position. In fact, subsequently he was confirmed by the Senate.
>
> * * *
>
> "Affidavits of Petersen and John Mitchell have been filed. They establish that Petersen was specially

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designated by Mitchell to authorize applications. They establish that Mr. Petersen recommended the authorization be granted. They also establish that the Attorney General himself reviewed these applications and personally approved the request." 350 F.Supp. at 1009.

Defendants now contend the recent decision in *United States v. Sklaroff*, No. 70-143-CR-WM, (D.C.S.D. Fla. May 24, 1973), would invalidate the reasoning in the earlier *Vigi* opinion and require a new trial based on the erroneous admission of the intercepted conversations at the earlier trial.

Sklaroff was one of several cases consolidated on a remand for further consideration in light of *United States v. Robinson*[4] for an evidentiary hearing to determine whether the applications for electronic interception orders presented to judges in those cases were properly authorized. A hearing was held on March 19-20, 1973. The Court heard testimony from John Mitchell, former Attorney General of the United States; Will Wilson, former Assistant Attorney General in charge of the Criminal Division of the Department of Justice; Henry Petersen, now Assistant Attorney General in charge of the Criminal Division; Sol Lindenbaum, Executive Assistant to the Attorney General; and Harold Shapiro, Deputy Assistant Attorney General in the Criminal Division. Based upon the testimony of these individuals, and numerous exhibits presented at the hearing, the Court suppressed the wiretap evidence in that case.

The hearing disclosed that on numerous occasions Henry Petersen, then Wilson's deputy, had exercised the blanket authority given him by Wilson to sign Wilson's name to Title III applications (wiretap authorizations). Petersen admitted

[4] 468 F.2d 189 (5th Cir. 1972) (panel opinion); 472 F.2d 973 (5th Cir. 1973) (*en banc* opinion); .... F.Supp. ....., No. 70-333 CR-WM (S.D. Fla. March 23, 1973) (findings and conclusions on remand).

signing Wilson's name to six (6) out of the eight (8) "Wilson" letters that were introduced into evidence at the hearing. The Court found in *Sklaroff* that this type of procedure was not a first-person declaration contained in the authorization letters, rather they were institutional declarations by the Criminal Division of the Department of Justice. There was evidence in *Sklaroff* that neither Mitchell or Wilson knew what use was being made of the letters.

In the present case, however, a first-person declaration was contained in the authorization letter. Henry Petersen signed his own name to the letters, not the name of Wilson or anyone else. The congressional scheme behind 28 U.S.C. § 2518 (1)(a) and (4)(d) of fixed responsibility was not subverted in the case as it was in *Sklaroff*. *See, United States v. Pisacano*, 459 F.2d 259 (2nd Cir. 1972); *United States v. Becker*, 461 F.2d 230 (2nd Cir. 1972).[5] Misidentification of the individual who authorized the application, or a total failure to identify anyone, are factors absent in the present case.

Suppression of the wiretap evidence is not appropriate in the present case where the interception was thoroughly reviewed, authorized by one with statutory authority and the lines of that authority are traceable to the approving and authorizing official or officials.

Defendants next contend their conviction of conspiracy represents a duplication of their convictions of violating 18 U.S.C. § 1955, and require the convictions be vacated.

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[5] In *Pisacano*, Sol Lindenbaum had approved the wiretap applications, but signed Wilson's name to the letter, much like the case in *Sklaroff*. Since Petersen signed his own name in the present case, Chief Judge Friendly's view that "The legislative history indicates that the purpose of both subparagraph (1)(a) and subparagraph (4)(d) of § 2518 was simply to ensure 'that responsibility will be fixed'. S.Rep.No. 1097, *supra*, 1968 U.S. Code Cong. & Ad.News at 2189 & 2192." 459 F.2d at 264, n.5, applies with even greater validity.

It is a fundamental principle that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses". *Callanan v. United States*, 364 U.S. 587, 593 (1961). As long as more than those necessary to complete the substantive offense (in this case five [5]) conspire to do so, the conspiracy and the substantive offenses are not conterminous. *United States v. Becker*, 461 F.2d 230, 234 (2nd Cir. 1972); *United States v. Riehl*, 460 F.2d 454 (3rd Cir. 1972); *United States v. Mainello*, 345 F.Supp. 863 (E.D. N.Y. 1972); *United States v. Leon*, ... F.Supp. .... No. 48080 (E.D. Mich. 1973).

Defendants next contend there was no evidence to sustain their conviction of a conspiracy in which they all participated. In addition, they contend the jury should have been instructed that the defendants knew, or should have known, the extent of the illegal activity required by 18 U.S.C. 1955. Both contentions raise the issue of what quantum of knowledge of the overall activity is required by a co-conspirator in a conspiracy prosecution.

To be included as a co-conspirator, the individual need only know the general purpose of the conspiracy and not the part played by each of the members of the conspiracy, nor their identity, and the division of the spoils is immaterial. *Poliafico v. United States*, 237 F.2d 97 (6th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957); *United States v. Chambers*, 382 F.2d 910 (6th Cir. 1967). A single conspiracy exists when the co-conspirators perform similar roles at different stages for the same ends. *Poliafico v. United States, supra.* The Court in *Poliafico* faced the question of multiple conspiracies in a narcotics conspiracy case where several suppliers of narcotics were found guilty of participating in the same conspiracy. The court stated:

"The over-all conspiracy was the plan, conceived by Poliafico and his associates, to buy and sell heroin at a profit. The suppliers knew that the purchases were for resale and they also knew that several conspirators were involved in the purchases. The fact that one supplier did not have dealings with another supplier does not matter. If each performs the same role at successive stages for the same ends, and both know and participate in the plan of the others to buy and sell heroin at a profit, each is guilty as a conspirator . . . The proofs of the Government show that all appellants were associated in this scheme, some by virtue of selling or delivering the heroin to the Poliafico group, others because of being associated with the group in carrying out the scheme by collecting money through resales of the drug, making payments to suppliers, or carrying on negotiations for the purchase or resale. All appellants knew of the conspiracy." 237 F.2d at 103, 104.

Thus, multiple conspiracies do not exist merely because the co-conspirators perform varying functions or only knowingly align themselves with the "hub" of the conspiracy. If the plan or scheme has as its purpose a common goal to which the co-conspirators align themselves, then a single conspiracy exists.

The instructions clearly and concisely charged that a defendant, to be convicted of "conducting" under 18 U.S.C. § 1955, must intentionally and knowingly do something that furthers all or part of the common goal of the business. Knowledge of the extent of the gambling business (*i.e.*, if there were five or more persons engaged in its conduct, lasts more than thirty [30] days, or does more than two-thousand dollars [$2,000] business in a day) is not required for conviction, and an instruction so requiring that knowledge and intent would be outside the ambit of the statute.

The common goal to which all defendants subscribed was the participation in accepting wagers on sporting events and horse races, and the exchange of line information for the mutual profit and benefit of all. The roles of each defendant, whether manager, line source, phone operator, collector, or branch bookmaker, were all designed to further this common gambling activity. No attempt was made by the Government to show each conspirator knew the other or knew all of the details of the operation. However, the admissions of the defendants and the telephone calls themselves show each voluntarily established their arrangement with Vigi and conducted their activities with the knowledge that at least Vigi and Alberts were working in concert, as well as others, to sustain the mutually beneficial gambling operation.

Nothing in the statutory language suggests that all five (5) required persons must combine together or know of the extent of the gambling enterprise in order to be in violation of 18 U.S.C. § 1955(a). Defendants correctly identify the legislative intent behind § 1955[6], but fail to accurately characterize how the statute fulfills that intent.

Obviously, "business-type gambling operations" and "syndicated operations" will generally involve combinations between defendants who are aware of the extent of the operation. But the paramount concern of Congress was with the impact of the illegal activity, not merely its size in

[6] "The intent of section 1511 and section 1955 is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that cases in which their standards can be met will ordinarily involve business-type gambling operations of considerably greater magnitude than simply meet the minimum definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function": H.R. Rep. No. 91-1549, 91st Cong. 2d Sess. (1970); 2 U.S. Code Cong. & Ad. News 1970 at 4029.

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physical terms. Therefore, knowledge by the participants of the extent of the illegal activity is irrelevant to the objective of Congress to control "operations [that] are so continuous and so substantial as to be of national concern."

Defendants also contend federal jurisdiction over this type of local, intrastate gambling activity impinges on areas of traditional state authority.

The authority of Congress to regulate this class of activities is clear. *United States v. Harris*, 460 F.2d 1041 (5th Cir. 1972); *United States v. Becker*, 461 F.2d 230 (2nd Cir. 1972); *Schneider v. United States*, 459 F.2d 540 (8th Cir. 1972). *See also*, House Report on Organized Crime Control Act of 1970, H.R. Rep. No. 91-1549, 91st Cong. 2d Sess. (1970); 2 U.S. Code Cong. & Ad. News 1970 at 4029. The concern of Congress was to regulate a particular class of gambling activities, which it found had an impact on interstate commerce. The defendant's lack of knowledge or the extent of the illegal gambling operations would not alter its nature under the Congressional determination as a class of activities properly subject to federal regulation. The sole question is whether the defendants' conduct falls within the class of regulated activities.

The fact defendants did not have knowledge of the extent of the business will not convert the large enterprise into a small, local concern which the states alone have authority to control. It is the impact of the enterprise which gives rise to federal jurisdiction, and the defendants' knowledge is irrelevant to this factual determination.

For the foregoing reasons, defendants' motions for a new trial are denied.

So ordered.

CHARLES W. JOINER,
United States District Judge.

Dated: Detroit, Michigan,
August 24, 1973.

LEED

APPENDIX B

Opinion of the Court of Appeals Below

No. 74-1748
No. 74-1749
No. 74-1750

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ORLANDO JAMES VIGI, DAVID PALMER, NICK FLOWERY, ROBERT GERALD PAPPAS, STEVEN KISHNER, BETTY ERDMAN,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed April 30, 1975.

Before: Lively and Engel, Circuit Judges; and Miles,* District Judge.

Lively, Circuit Judge. Five of the appellants in this case were convicted by a jury of violating 18 U.S.C. § 371 by

* The Honorable Wendell A. Miles, Judge, United States District Court for the Western District of Michigan, sitting by designation.

engaging in a conspiracy to conduct a gambling business which was illegal under Michigan law, and of the substantive offense of conducting such a business in violation of 18 U.S.C. § 1955. The other appellant, Betty Erdman, was convicted on the conspiracy count but was acquitted of the substantive charges. Three codefendants were acquitted of both conspiracy and violation of § 1955. Since it is not contended that the evidence which was admitted was not sufficient to support the jury verdict, no recitation of facts will be made except as required to deal with the legal issues raised on appeal.

The evidence of participation by appellants in illegal gambling activities in the Detroit area consisted in major part of transcripts of intercepted telephone conversations. The defendants moved in the district court to suppress all such evidence, *inter alia*, on the ground that the authorization for the Department of Justice attorney to make application for an intercept order contained in a letter from Henry E. Petersen, who was acting assistant attorney general at the time, was insufficient on its face. This letter identified Mr. Petersen as the person who made the decision to authorize the application. It was claimed in the district court and is contended on appeal that Acting Assistant Attorney General Petersen was not empowered under 18 U.S.C. § 2516 to authorize such an application. The statute (Section 2516(1)) provides, "The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge . . . ." John N. Mitchell, who was attorney general at the time the authorization was issued, filed an affidavit that he had personally considered and approved the request from the field representative of the Department of Justice for authorization to apply to a federal judge for the wiretap order which subsequently was issued.

The appellants argue that it makes no difference that the Attorney General actually considered and approved the request, since the letter of authorization itself showed on its face that approval had been given by an acting assistant attorney general.

We believe that disposition of this issue is controlled by *United States* v. *Chavez*, 416 U.S. 562 (1974). In that case, the Attorney General had personally authorized the application, but the letter of authorization, the application and order all had erroneously recited approval by an assistant attorney general. The Supreme Court held that in such a situation the misidentification of the person authorizing the wiretap application "does not require suppression of wiretap evidence when the Attorney General himself has actually given the approval . . . ." 416 U.S. at 569. In *Chavez*, the Court distinguished *United States* v. *Giordano*, 416 U.S. 505 (1974), where approval of the authorization was given by the executive assistant to the Attorney General. We read *Chavez* to hold that it was the intent of Congress in permitting limited interception of communication to require that authorization to apply for intercept orders proceed from a politically responsible government official who is identifiable. This requirement is satisfied when it is shown that the Attorney General of the United States is the person approving the authorization. The arguments which appellants have made in this case, based on the facts which distinguish it from *Chavez*, were presented to the Fifth Circuit in *United States* v. *Robertson*, 504 F.2d 289 (1974), and to the Third Circuit in *United States* v. *Acon*, ... F.2d ..... (No. 74-1766, decided March 6, 1975). Although *Chavez* dealt primarily with suppression under § 2518(10)(a)(i) [but see 416 U.S. at 573-74] and it is claimed that § 2518(10)(a)(ii) requires a stricter standard we agree with the Third Circuit that (10)(a)(ii) does not

require suppression "for every minor facial insufficiency." *Id.* (slip opinion at 8). See also *United States* v. *Boone*, 499 F.2d 551 (4th Cir. 1974), *rev'g United States* v. *Boone*, 348 F. Supp. 168 (E.D. Va. 1972). Having determined that the authorization in this case was actually approved by the Attorney General, we do not reach the question of the authority of an acting assistant attorney general to give such approval.

We consider next the contention that the court erred in instructing the jury on the effect of accomplice testimony. The specific charge which the court gave is as follows:

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice or co-conspirator does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice or co-conspirator alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.
>
> You should never convict a defendant upon the unsupported testimony of an alleged accomplice or co-conspirator, unless you believe that unsupported testimony beyond a reasonable doubt.

No objection was made to the giving of this instruction, and we are urged to treat it as plain error under Rule 52(b), Fed. R. Crim. P. In the absence of objection to instructions we cannot consider a claim of error unless the instructions are so manifestly prejudicial as to lead to a miscarriage of justice. *United States* v. *Foster*, 407 F.2d 1335 (6th Cir.), *cert. denied*, 396 U.S. 862 (1969). Not only did the defendants fail to object

to the instructions as given; they requested an instruction on accomplice testimony which is quite similar to that given by the court. The requested charge was—

> While you may convict the Defendant upon the uncorroborated testimony of an accomplice, nevertheless, before you should decide to do so, you must review that testimony with caution and find that it is fair and convincing and that it has been proven to your satisfaction that the Defendant is guilty beyond a reasonable doubt.

In view of the language of the requested charge and the failure to object to the charge as given there was no way for the district court to know or pass upon the allegation of error which is now being made.

The basic argument which appellants make concerning the instruction is that the court informed the jury that it could convict on the basis of accomplice testimony, but failed to charge that it could acquit on the basis of such testimony. It is contended that the Supreme Court of the United States dealt with a similar situation in *Cool* v. *United States*, 409 U.S. 100 (1972), citing the following language, "[T]he instruction was still fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis. Even had there been no other error, the conviction would have to be reversed on the basis of this instruction alone." *Id.* at 103, n.4. The accomplice testimony which was considered by the Supreme Court in *Cool* was quite different from that heard in the present case. There the chief witness for the defense admitted his own guilt, but insisted that the petitioner Cool was not involved in the crime, and the Supreme Court found that his testimony was "completely exculpatory." *Id.* at 101. In the present case, the accomplices testified on their own behalf and gave self-exculpatory testimony. They were not testifying

on behalf of the other defendants, seeking to show their innocence, but were concerned solely with establishing their own innocence. Furthermore, it is apparent from reading the opinions of the Supreme Court and the Court of Appeals for the Seventh Circuit, 461 F.2d 521 (1972), that there was an objection to the instructions in *Cool* and that the Court did not consider the allegation of error in the instructions under the plain error rule. The instruction which the district court gave in the present case was sufficient in view of the nature of the accomplice testimony.

The third claim of error relates to the admission into evidence of a conversation between two co-defendants, Vigi and Alberts in which Vigi reported what another co-defendant Pappas had told him concerning activities of the appellant Erdman as reported to Pappas by a third person. The conversation was as follows:

> "Alberts: Yes, well like I said I think she's (reference to defendant Erdmann) still booking, you know, look
>
> . . .
>
> Vigi: Well she is
>
> Alberts: For herself
>
> Vigi: Definitely booking
>
> Alberts: You know
>
> Vigi: You know why, you know why, uh, I think where this all comes about. *I think it was a couple days ago when Bob (reference to defendant Robert Pappas) was pickin [sic] up from this other joint, I had to meet him on something and uh, you know he was telling me where this guy's getting a line from Betty.* (emphasis supplied)
>
> Alberts: Uh huh
>
> Vigi: Yea, you understand what I'm saying?
>
> Alberts: Yes.
>
> Vigi: And I turned around ad said to him, uh, what

guy? Some guy in some bar out on the east side and I say uh, you mean to tell me she's giving him a line?

Alberts: Yea

Vigi: He says yea, that's what I hear, I say are you kiddin [sic] me . . . Bob though she was still coming in with us."

It is claimed that the conversation contained "multiple hearsay" which involved an unknown man telling Bob something, which he relayed to Vigi, and which Vigi told to Alberts. The fact of Erdman's participation in the conspiracy had already been established and the evidence which is objected to merely dealt with a possibility that Erdman was also running an independent bookmaking operation. Since the jury acquitted Erdman of the substantive charges of conducting illegal gambling operations and her membership in the conspiracy for which she was convicted was established by other competent evidence we fail to see how she was prejudiced by the admission of evidence which dealt only with substantive offenses. The government maintains that the evidence was offered simply as further proof of Erdman's membership in the conspiracy and that it was not offered to establish the truth of the report which "Bob" made to Vigi. Under these circumstances, it would be admissible as an exception to the hearsay rule since the conversation between two co-conspirators, Alberts and Vigi, established Erdman's connection with the conspiracy.

The final issue which we consider on appeal was stated in the brief of appellants as follows:

> [Did t]he convictions of [defendant-]appellants for conspiracy to violate 18 U.S.C. § 1955 represent a duplication of their convictions for violating 18 U.S.C. § 1955[?]

In order for a conviction to be obtained under 18 U.S.C. § 1955 it must be shown that five or more persons were engaged in conducting an illegal gambling enterprise. The prosecution must show that two or more persons have agreed or conspired to operate an illegal gambling enterprise involving at least five persons to obtain a conviction under § 371 of conspiracy to violate § 1955. It is claimed that conviction on both counts violates "Wharton's Rule," which has been stated as follows:

> When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. 2F. Wharton, Criminal Law § 1604, at 1862 (12th ed. 1932).

The Rule has been more directly stated in a later edition of the treatise as follows:

> An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.
> 1 Anderson, Wharton's Criminal Law and Procedure § 89, at 191 (1957).

This issue has been determined adversely to the position of appellants in *Ianelli* v. *United States*, ... U.S. ..... 43 U.S. L.W. 4423 (March 25, 1975). The opinion of the Supreme Court discusses the history of Wharton's Rule and the finding of a congressional intent that it not apply to prosecutions for violation of § 1955.

The judgment of the district court is affirmed.

APPENDIX C

Denial of Petition for Rehearing

Office of the Clerk
UNITED STATES COURT OF APPEALS
For the Sixth Circuit
Cincinnati, Ohio 45202

John P. Hehman
Clerk

June 18, 1975

Mr. James E. Roberts
Mr. Ralph B. Guy
Ms. Judith A. Metzner
Mr. Marc Richman
c/o Mr. T. George Gilinsky
Mr. James K. O'Malley

Re: U.S.A. vs. Betty Erdmann, et al.
Case Nos. 74-1748-50
Dist. Ct. Cr. No. 46922

Dear Counsel:

Enclosed is a copy of an order which was entered today in the above-styled case.

Yours very truly,

JOHN P. HEHMAN, Clerk,
By DARLENE KOENIG,
Darlene Koenig,
Deputy Clerk.

Enclosure

Order

No. 74-1748
No. 74-1749
No. 74-1750

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ORLANDO JAMES VIGI, DAVID PALMER, NICK FLOWERY, ROBERT GERALD PAPPAS, STEVEN KISHNER, BETTY ERDMANN,
Defendants-Appellants.

ORDER

Before: Lively and Engel, Circuit Judges; and Miles*, District Judge.

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing *en banc*, the petition for rehearing filed herein by the defendants-appellants has been referred to the panel which heard the

* The Honorable Wendell A. Miles, Judge, United States District Court for the Western District of Michigan, sitting by designation.

original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk,
By Grace Keller,
Grace Keller,
Chief Deputy.

APPENDIX D

Statutes Involved

18 U.S.C. 2518 provides in pertinent part:

> (10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.